Supreme Court, U.S.
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No. 04-415

In The

Supreme Court of the United States

JAMES LAWRENCE LATIMER,

Petitioner,

v.

SHERRY BURT, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE CONFRONTATION CLAUSE IS VIOLATED BY RESTRICTIONS ON CROSS-EXAMINATION REGARDING WITNESSES' PATTERNS OR PRACTICES OF UNTRUTHFULNESS?

II. WHETHER, IN A CASE BASED SOLELY ON THE TESTIMONY OF INFORMANT/ACCOMPLICE WITNESSES, DUE PROCESS REQUIRES A SPECIAL CAUTIONARY INSTRUCTION TO THE JURY?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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BASIS OF JURISDICTION IN THIS COURT

The Opinion of the Sixth Circuit Court of Appeals was filed on May 14, 2004, and a timely filed motion for rehearing was denied by Order entered June 14, 2004. This petition is being filed within ninety (90) days of that date as required by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI, Confrontation Clause:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

Constitution of the United States, Amendment XIV, Due Process Clause:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On May 22, 1998, petitioner was convicted of First-Degree Murder (contrary to MCL 750.316) and Possession of a Firearm During the Commission of a Felony (contrary to MCL 750.227b), after a jury trial held in the Oakland County, Michigan, Circuit Court, and sentenced by that court, the Hon. Nanci Grant presiding, to mandatory terms of two years followed by life in prison without possibility of parole, on May 22, 1998. He appealed his convictions as of right to the Michigan Court of Appeals, raising the following assignments of error:

1. Defendant-appellant was denied a fair trial, and his constitutionally guaranteed rights of confrontation, by the trial court's improper restrictions on his cross-examination of the key prosecution witnesses, and

2. Defendant-appellant was denied a fair trial by the court's instructions to the jury, which did not fairly caution the jury regarding critical questions of witness credibility, and did not present the jury with the issue of imperfect self-defense.

The Court of Appeals affirmed his convictions and sentences in an unpublished opinion filed March 28, 2000, and the Michigan Supreme Court denied his timely filed Application for Leave to Appeal on September 26, 2000.

On September 26, 2001, he filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan, which was duly assigned for hearing to the Hon. Marianne O. Battani, United States District Judge. The claims advanced in the petition were:

1. Petitioner was denied a fair trial, and his constitutionally guaranteed right of confrontation, by the trial court's improper restrictions on his cross-examination of the key prosecution witnesses; and

2. Petitioner was denied a fair trial by the court's instructions to the jury regarding critical questions of witness credibility.

On September 25, 2002, Judge Battani filed an Opinion and Order, and entered a final judgment, denying the petition.

After obtaining a Certificate of Appealability as to both issues from the Sixth Circuit Court of Appeals, petitioner appealed the denial of habeas corpus relief to that court, which ultimately affirmed in an unpublished opinion issued May 14, 2004, and denied a timely filed motion for rehearing of that decision on June 13, 2004.

The charges in the case at bar arise from the killing of Robert Minauro, by one shot from a pistol, in the basement of petitioner's home on August 26, 1997. The prosecution claimed the killing was premeditated first-degree murder; petitioner acknowledged shooting Minauro, but testified that he did so in self-defense. The physical evidence did not support one version of the events to the exclusion of the other, but was consistent with both. Rather, the trial turned on the assessment of witness credibility.

The Sixth Circuit outlined the facts of the case, and the issues presented, as follows:

> The prosecution's case against Latimer was based primarily upon the testimony of three witnesses: John Richardson, William Heath, and Matthew Dumas. The only witness to the shooting was Richardson, a mutual friend of Latimer and

Robert Minauro, the victim in this case. Richardson testified that he acted as a middleman for a loan of $5,000 from Minauro to Latimer for the purchase of LSD. Latimer did not have the money to repay Minauro a month later, so he proposed to satisfy the loan obligation by selling Minauro a large quantity of discounted marijuana instead. At the meeting for the marijuana sale in August of 1997, Latimer shot and killed Minauro.

The state contended that Minauro was shot while he was inspecting a box that purportedly contained the marijuana. Latimer, on the other hand, claimed that he shot Minauro in self-defense. The day after the shooting, Richardson gave a statement to the police in which he said that Latimer was not defending himself when he shot and killed Minauro. But Richardson did not mention either the drugs or the loan when he gave his statement because he wanted to avoid implicating himself in the criminal activity.

During Latimer's trial, the state trial court prohibited Latimer from cross-examining Richardson regarding the latter's testimony in an unrelated 1992 drug conspiracy trial in Iowa. Latimer contends that Richardson had falsely claimed to be an innocent bystander in the Iowa case, and that his prior testimony was therefore relevant to impeach his credibility in the present case, where Richardson again claimed to be an innocent bystander.

William Heath testified that he had been Latimer's prison cellmate in December of 1997. Latimer, according to Heath, repeatedly said that he shot Minauro in order to steal the money that Minauro had brought to the meeting for the purchase of the marijuana. Self-defense was never

mentioned as a motive.[1] At the time of Latimer's trial, Heath was the defendant in a separate criminal trial before the same judge. Heath was charged with conducting a criminal enterprise and with child sexual abuse, both arising from Heath's operation of an "adult entertainment" business that allegedly employed underage females. During Latimer's trial, the state court permitted defense counsel to cross-examine Heath regarding the existence of pending felony charges against him and the maximum possible penalties associated with those charges. But the court would not allow Latimer to inquire about the nature of Heath's business, the details of the pending felony charges, or his alleged "use of lies and deceit in the operation of his business."[2]

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[1] Heath testified that petitioner told him that although self-defense was the "official version," in fact the deceased had never had a gun, wasn't trying to rob him, and that "[h]e shot him because the guy had the cash with him supposedly for the purchase of the marijuana and that his intent was to rob him."

[2] Specifically, Heath was alleged to have instructed several of the women to put down false ages (and, in one case, a fabricated social security number) on their employment records, and to have assured them that "if anything happens, I will say that you lied to me." Heath was held on a $500,000 bond, which he could not make. When he filed a motion to reduce that bond, the Oakland County Prosecutor opposed the motion, alleging, among other things, that he "has made threatening phone calls to potential witnesses in this case," and attached a police report detailing statements by a former office employee of Heath's and her parents, detailing a series of telephone calls in which Heath sought the recovery, destruction, or secreting of a briefcase which contained damaging evidence against him. At the hearing on the motion (which was denied), the prosecution repeated these allegations, and pointed out the pattern of deceit which was the heart of the prosecution's case against Heath.

Petitioner sought permission to conduct three lines of questioning. First, he indicated that he wished to ask questions regarding the nature of Heath's employment, in order to "[p]lace the witness in the

(Continued on following page)

The prosecution's third witness, Matthew Dumas, was a longtime acquaintance of Latimer.[3] Dumas testified that Latimer had told him that Minauro was unarmed at the time of the shooting.[4] Latimer asked the trial court for permission to cross-examine Dumas regarding "his numerous misdemeanors and petty offenses on the theory that Dumas was so frequently in front of the Oakland County Prosecutor that he might be trying to gain the latter's favor." But the trial court prohibited Latimer from asking Dumas about either his overall criminal record or the allegedly false statements that Dumas had made to various judges in connection with his prior offenses.[5]

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context of the community," citing *Alford v. United States,* 282 U.S. 687 (1931). Second, he advised the trial judge that he wished to ask questions regarding the nature of the charges against Heath, and the way in which his efforts to gain release on bond had been successfully opposed by the prosecutor, as might affect his motivation to offer testimony helpful to the prosecution, because "[t]he jury needs to know how much trouble Mr. Heath is in because it's relevant to how much Mr. Heath will do to get out of trouble." Third, he explained that he wished to inquire regarding the witness's use of lies and deceit in the operation of his business, and his witness tampering.

[3] Actually, the trial record reflects that Dumas had known petitioner as a child, and had not seen him in many years when he encountered him in the County Jail.

[4] Specifically, Dumas testified that the petitioner told him that as he walked down the stairs into the basement, he felt the deceased put something hard to his back, or the back of his head (perhaps a gun), so when "Jamie had a chance to shoot, he shot him;" however, as it turned out, the deceased had no gun.

[5] Petitioner sought permission to examine Dumas in two areas: (1) to show that Dumas had repeatedly been charged by the Oakland County Prosecutor's office (on behalf of which he appeared in petitioner's trial) with misdemeanors and petty offenses, had repeatedly been put on probation, and had repeatedly violated that probation, "that he's a guy that's going to be back and this is – helping the Prosecutor's office in this

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> At the close of proof, the trial court gave standard witness-credibility instructions to the jury. The jury was instructed to consider prior inconsistent statements to evaluate credibility, as well as any interest, bias, or personal interest in the case, or special reasons to lie. But the trial court refused Latimer's request to give specific instructions regarding the credibility of accomplices and informants.

(App. 2-4).

The court went on to hold that there was no Confrontation Clause violation in regard to the restriction on cross-examination of the witnesses Richardson and Heath, and that any violation as to Dumas was harmless, and that the refusal to give a cautionary instruction did not amount to a Due Process violation.

ARGUMENT

A. The restrictions placed on petitioner's cross-examination of the informant/accomplice witnesses upon whose testimony the prosecution's case depends violated the Confrontation Clause, and the decision below rests upon an interpretation of that guarantee which is inconsistent with this Court's decisions.

The decision of the Sixth Circuit was based on a distinction drawn in *Boggs v. Collins*, 226 F.3d 728 (6th Cir.

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case is like money in the bank" to him; and (2) that when he was hied before the various courts whose probation he had violated, he told "boldface lies" to those courts "to suit his own purpose," and that "I should be permitted to ask him specifically about those lies that he told to those judges just like we say he's coming in to this court and telling these lies."

2000), which held, as the opinion in the case at bar states, that "cross-examination as to bias, motive or prejudice is constitutionally protected, but cross-examination as to general credibility is not." App. 6. This conclusion was based on the *Boggs* panel's examination of *Davis v. Alaska*, 415 U.S. 308 (1974) and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), which did in fact involve cross-examination regarding matters of bias, but is not contained in any holding of this Court.

Petitioner maintains that the distinction drawn by the Sixth Circuit is an illusory one, and to the extent that it has any legitimacy, it cannot be drawn in a vacuum.

The starting point for any exploration of this Court's Confrontation Clause jurisprudence must be *Alford v. United States*, *supra*, which involved an attempt by defense counsel to inquire as to where a government witness lived, to show the jury "who the witness is, where he lives, and what his business is," inquiries which were foreclosed by the trial judge. *Id.*, at 690. The Court held that the exclusion of such inquiries violates a defendant's Confrontation Clause rights:

> Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood, that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment, and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased,
>
> * * *

> The question, 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.

Id., at 691-693 (citations omitted).

Alford, therefore, holds that, at the very least, cross-examination must *always* be allowed to "identify[] the witness with his environment." "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." *Id.*, at 692.[6]

These concerns again drove the Court's decision in *Davis v. Alaska, supra.* There, a stolen safe was found near the home of one Green. When questioned, Green told the police that he had seen two men – one of whom he identified as Davis – and a car in the vicinity of where the safe was found; at one point, Green testified, he saw the defendant standing "with something like a crowbar in his hands." *Id.*, at 309-310. Defendant sought to bring out that at the time of his questioning and testimony, Green was "on probation by order of a juvenile court after having

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[6] This aspect of the Court's holding in *Alford*'s was echoed in *Smith v. Illinois*, 390 U.S. 129 (1968), in which the Court found a Sixth Amendment violation in the refusal to allow inquiry as to the name and residence of a government witness (apparently testifying under a pseudonym), on the basis that "when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives." *Id.*, at 131.

been adjudicated a delinquent for burglarizing two cabins," *Id.*, at 310, but the state courts had barred the inquiry on the basis of the confidentiality of juvenile dispositions under Alaska statute and court rule.

The Court held that the prohibition violated Davis's confrontation rights, because of the significance of Green's testimony, and the way in which his personal situation may well have operated to affect that testimony, and would therefore shed light on his credibility:

> Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence §940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and

> important function of the constitutionally protected right of cross-examination. *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).
>
> In the instant case, defense counsel sought to show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.

Id., at 316-317.

Thus, *Davis* makes clear that examination as to bias is but one aspect of the kind of cross-examination which is guaranteed by the Confrontation Clause. Pursuant to these principles, the Court has strictly limited the degree to which cross-examination may be curtailed.

Thus, for example, in *Alford v. United States*, *supra*, the Court explained why it would not uphold a claim that exploration of a witness's criminal history was somehow improper – even in the absence of a showing that that record, and the witness's confinement, *might* have affected his testimony:

> The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the

> bonds of proper cross-examination merely to harass, annoy or humiliate him.

Id., at 694 (citations omitted).

The limited scope of restrictions on cross-examination which may survive Confrontation Clause scrutiny is also reflected in *Olden v. Kentucky*, 488 U.S. 227 (1988). In *Olden*, the defendant was prosecuted for sexual assault on the basis of testimony by the alleged victim, Starla Matthews, and corroboration in the form of testimony by a witness, Bill Russell, in the vicinity of whose house she had been dropped off after the incident. *Id.*, at 228-229. The defense was consent, and defendant sought to bring out the fact that, at the time of trial, Matthews and Russell were living together ("[a]lthough Matthews and Russell were both married to and living with other people at the time of the incident, they were apparently involved in an extramarital relationship") in support of his theory "that Matthews concocted the rape story to protect her relationship with Russell, who would have grown suspicious upon seeing her disembark . . ." *Id.*, at 229-230.

The trial judge in *Olden* did not allow inquiry into the witnesses' living arrangements, and the state appellate court agreed, on the basis that the probative weight of the evidence would have been greatly outweighed by the potential for unfair prejudice, at least on the basis of "the undisputed facts of race; Matthews was white and Russell was black. For the trial court to have admitted into evidence testimony that Matthews and Russell were living together at the time of the trial may have created extreme prejudice against Matthews." *Id.*, at 231.

The Court held that no such considerations could properly be held to overcome the defendant's right of confrontation:

> The Kentucky Court of Appeals failed to accord proper weight to petitioner's Sixth Amendment right "to be confronted with the witnesses against him." That right, incorporated in the Fourteenth Amendment and therefore available in state proceedings, *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), includes the right to conduct reasonable cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-316, 94 S.Ct. 1105, 1109-10, 39 L.Ed.2d 347 (1974).
>
> In *Davis v. Alaska*, we observed that, subject to "the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation . . . , the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness." *Id.*, at 316, 94 S.Ct., at 1110. We emphasized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.*, at 316-317, 94 S.Ct. at 1110, citing *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959). Recently, in *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), we reaffirmed *Davis*, and held that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the

> witness.'" 475 U.S., at 680, 106 S.Ct., at 1436, quoting *Davis, supra*, 415 U.S., at 318, 94 S.Ct., at 1111.
>
> In the instant case, petitioner has consistently asserted that he and Matthews engaged in consensual sexual acts and that Matthews – out of fear of jeopardizing her relationship with Russell – lied when she told Russell she had been raped and has continued to lie since. It is plain to us that "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." *Delaware v. Van Arsdall, supra*, 475 U.S., at 680, 106 S.Ct., at 1436.

Id., at 231-232.

In the case at bar, the proposed cross-examination was clearly necessary to allow the jury to understand not just who the witnesses were, but how it was that they came to give the testimony that they did – *i.e.*, to identify, demonstrate, and illustrate their motivations, and set before the jury concrete manifestations of how those motivations worked.

Thus, for example, it was *not* enough, constitutionally speaking, to allow petitioner to establish that Richardson, Heath or Dumas were, or had been "under the gun;" it was necessary for the jury to understand how being "under the gun" motivated them, what kind of conduct it induced in them, in order to fairly evaluate how and why they came to testify in petitioner's trial the way they did.

Here, the witnesses' motivations were intimately tied up with their histories and the facts about those histories which petitioner sought, unsuccessfully, to explore. Without

the information which petitioner sought to place before the jury, the jurors could not fairly appraise the weight to be given their testimony.

Even if the *Boggs* distinction has any validity in theory, it breaks down in application, as is made clear by the circumstances of the case at bar. Thus, the nature of the cross-examination at issue here involved far more than the simple exploration of "general credibility" – it bore not only on the witnesses' conscious motivations for lying, but also on their unconscious, emotional motivation. It would have demonstrated to the jury the kinds of circumstances that moved the witnesses enough to elicit untruths – circumstances that mirrored those which petitioner maintained moved them to untruthfulness in his trial.

Thus, petitioner was forbidden to show the jury how John Richardson's reaction to law enforcement scrutiny was perjury, and how he had learned that by perjury he could win his freedom, to demonstrate how lies, and planning to lie, had been a central part of William Heath's business (*i.e.*, that motivations far less strong than his freedom induced him to lie) or how, when those lies caught up with him, he had tried to buy his freedom by obstruction of justice, or to prove how Matthew Dumas had repeatedly won and re-won leniency by coming to court and telling the boldest of lies, or how that history made him especially vulnerable to further prosecution, and, for that reason, more susceptible to considerations of "fear or favor." The trial judge even foreclosed inquiry into the nature of William Heath's business – defying the teaching of *Alford* that the starting point of cross-examination is putting the witness in context – and the nature of the charges against him.

The state court rulings foreclosed precisely the kind of inquiries which governing Supreme Court precedent requires be permitted. The Michigan courts did so by giving a cramped and dismissive reading to petitioner's confrontation rights, and by disregarding the limitations which this Court has placed on a trial judge's discretion to limit cross-examination, by foreclosing cross-examination which would not have involved "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant," *ibid.*, or "attempted invasion of [the] constitutional protection from self-incrimination," *Alford*, *supra*, at 694, but, rather, worked merely "to protect [the] witness[es] from being discredited on cross-examination," *ibid.*, and thereby "effectively . . . emasculate[d] the right of cross-examination itself." *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

Because the Sixth Circuit decision in the case at bar demonstrates a fundamental misunderstanding and misapplication of the principles of this Court's Confrontation Clause jurisprudence, the Court should grant *certiorari*, and reverse the decision below in a manner that vindicates the principles of that jurisprudence and provides meaningful guidance in this important area.

B. Petitioner's Due Process rights were violated by the refusal, in a case based solely on the testimony of informant/accomplice witnesses, to give a special cautionary instruction to the jury, and the decision below upholding that refusal is inconsistent with this Court's decisions, and with those of other Circuits

Petitioner requested, and the trial judge refused to give, Michigan Standard Criminal Jury Instructions CJI

2d 5.5 (Witness a Disputed Accomplice)[7] and CJI 2d 5.6 (Cautionary Instruction Regarding Accomplice Testimony).[8]

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[7] CJI 2d 5.5 provides as follows:

(1) Before you may consider what [*name witness*] said in court, you must decide whether [he/she] took part in the crime the defendant is charged with committing. [*Name witness*] has not admitted taking part in the crime, but there is evidence that could lead you to think that [he/she] did.

(2) A person who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice.

(3) When you think about [*name witness*]'s testimony, first decide if [he/she] was an accomplice. If, after thinking about all the evidence, you decide that [he/she] did not take part in this crime, judge [his/her] testimony as you judge that of any other witness. But, if you decide that [*name witness*] was an accomplice, then you must consider [his/her] testimony in the following way: [to be followed by CJI 2d 5.6]

[8] CJI 2d 5.6 provides as follows:

(1) You should examine an accomplice's testimony closely and be very careful about accepting it.

(2) You may think about whether the accomplice's testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the prosecutor's using an accomplice as a witness. You may convict the defendant based only on an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.

(3) When you decide whether you believe an accomplice, consider the following:

(a) Was the accomplice's testimony falsely slanted to make the defendant seem guilty because of the accomplice's own interests, biases, or for some other reason?

(b) Has the accomplice been offered a reward or been promised anything that might lead [him/her] to give false testimony? [*State what the evidence has shown. Enumerate or define reward.*]

(Continued on following page)

In addition to requesting the standard "accomplice" instructions, petitioner also submitted the following request for an instruction (adapted from 1 E. J. Devitt, C. B. Blackmar, M. A. Wolff, and K. F. O'Malley, Federal Jury Practice and Instructions (4th Ed. 1992), §15.02), which would have conveyed the necessary caution to the jury, irrespective of whether the witness in question would be classified as an "accomplice" as a matter of substantive criminal law:

> **Credibility of Witnesses – Informant**
>
> The testimony of an informant, someone who provides evidence against someone else in the hope of leniency, or to escape punishment for his own misdeeds or crimes, or for other personal reason or advantage, must be examined and weighed by the jury with greater care than the testimony of a witness who is not so motivated.
>
> The jury must determine whether the informer's testimony has been affected by self-interest, or by his hope for leniency, or his own interest in the outcome of this case, or by prejudice against the defendant.

This Court's precedent makes clear, of course, that accomplice/informant credibility instructions are indeed

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(c) Has the accomplice been promised that [he/she] will not be prosecuted, or promised a lighter sentence or allowed to plead guilty to a less serious charge? If so, could this have influenced [his/her] testimony?

[(d) Does the accomplice have a criminal record?]

(4) In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

"proper," precisely for the reasons urged by petitioner to the Michigan courts: because such a witness "may have a special interest in testifying, thus casting doubt upon his veracity." *Cool v. United States*, 409 U.S. 100, 103 (1972); *Crawford v. United States*, 212 U.S. 183, 204 (1909) ("the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses."). The issue framed by this case is whether, especially in a closely drawn case which depends solely upon accomplice/informant testimony, such instructions must be given if the Due Process guarantee is not to be violated.

Although the Sixth Circuit held otherwise, other federal appellate decisions have specifically recognized cautionary instructions of the sort here involved as a basic component of the due process guarantee:

> Due process requires four specific procedural safeguards. First, the Government must not deliberately use, or encourage the use of, perjured testimony. [*See Hart v. United States*, 565 F.2d 360, 362 (5th Cir.1978)] Second, there must be a complete and timely disclosure of the fee arrangement; third, there must be adequate opportunity for cross-examination regarding the arrangement, [*See United States v. Bagley*, 473 U.S. 667, 675-84, 105 S.Ct. 3375, 3380-85, 87 L.Ed.2d 481 (1985); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] and fourth, "a defendant is entitled to a special cautionary instruction on the credibility of an accomplice or a government informer if he requests it and the testimony implicating the accused is elicited solely from the informer or

> accomplice." [*United States v. Beard*, 761 F.2d 1477, 1481 (11th Cir.1985)].

United States v. Wilson, 904 F.2d 656, 659 (11th Cir. 1990) (footnoted references in brackets).

While this Court has never directly addressed the issue, petitioner maintains that those decisions of the Court which caution against instructions which dilute the prosecution's burden of proof compel the conclusion that such cautionary instructions are indeed required by the Due Process guarantee.

Thus, the Court has held that due process is denied when jury instructions failed to require the jury to find all elements of the offense charged, *e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 122-123 (1990), or inadequately define the constitutionally mandated burden of proof beyond a reasonable doubt. *E.g.*, *Cage v. Louisiana*, 498 U.S. 39 (1990). Likewise, where instructions dilute the prosecution's burden of proof by way of conclusive presumptions, they violate due process because they "subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." *Carella v. California*, 491 U.S. 263, 265 (1989).

While "[a] jury instruction on the presumption of innocence is not constitutionally required in every case to satisfy due process," *Kentucky v. Whorton*, 441 U.S. 786, 789 (1979), in *Taylor v. Kentucky*, 436 U.S. 478 (1978) the Court held that a defendant's due process rights were violated when the trial court refused to give requested jury instructions "that '[t]he law presumes a defendant to be innocent of a crime,' and that the indictment, previously read to the jury, was not evidence to be considered against

the defendant," because "[w]hile use of the particular phrase 'presumption of innocence' – or any other form of words – may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.'" *Id.*, at 480-481, 485-486 (quoting *Estelle v. Williams*, 425 U.S. 501, 503 (1976)).

Similarly, while no Supreme Court decision specifically holds that the Constitution mandates the giving of a cautionary instruction regarding a defendant's not testifying in his own defense, in *Carter v. Kentucky*, 450 U.S. 288, 303 (1981), this Court held that a trial judge "has an affirmative constitutional obligation" to give such an instruction when a non-testifying defendant requests such an instruction. "[J]urors are not experts in legal principles," the Court wrote; "to function effectively, and justly, they must be accurately instructed in the law." *Id.*, at 302.

The overriding principles which emerge from these decisions, petitioner submits, are, first, that jury instructions which dilute the prosecution's burden of proof, or fail to accurately frame the "truth-finding process assigned solely to juries" violate due process, and, second, that where a defendant requests that a jury's attention be particularly drawn to important guideposts to its decisionmaking, due process requires that they be so instructed.

Petitioner submits that allowing the jury to consider the testimony of the principal prosecution witnesses without an appropriate cautionary instruction, as requested by him, effectively diluted the prosecution's burden of proof, because it allowed the prosecution, and

the jury, to give undue weight to their testimony. He maintains, as well, that the failure to give the requested instructions undermined the accuracy of the "truth-finding process," and so violated his due process rights.

The Michigan courts focused on whether the witnesses were or were not, technically speaking "accomplices"[9] or "informants." As a matter of common experience, of course, human motivation transcends labels. By way of illustration, consider the situation in which John Richardson found himself after the killing of Robert Minauro.

The trial record presented the jury with two alternative versions of how that killing occurred: either Jamie Latimer set a trap for Minauro, and Richardson escorted Minauro into it, knowing that Latimer was laying in wait, or Minauro came to Latimer's house with violence on his mind, and Richardson accompanied him, knowing that

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[9] On direct appeal, petitioner pointed out that if the jury believed him, Richardson could have been found to have in fact *been* an accomplice to the murder of which he accused the petitioner. Thus, Richardson's testimony was that he brought Minauro to petitioner's house, knowing that petitioner had said he was going to kill Minauro. This testimony, if believed, might well make out second-degree murder under Michigan law, on the basis that it constituted conduct in wanton and willful disregard of the likelihood of its natural tendency to cause death or great bodily harm. *See People v. Goecke*, 457 Mich. 442, 464 (1998). In addition, under Michigan law, any murder committed during the course of a serious drug offense qualifies as felony murder, MCL 750.316(1)(b), and Richardson was admittedly knee-deep in the drug transactions that led up to the killing. The Court of Appeals responded that the argument had been waived, but went on to hold that the instruction "would not have been proper because there was no evidence that Richardson knowingly and willingly helped or cooperated in the killing," because "[u]nder the standard jury instruction, Richardson must have been an accomplice for the crime for which defendant was charged." (App. 28) (Citations omitted).

violence was in the air. With a dead body to account for, the product of drug transactions which he had admittedly initiated, what difference could it possibly have made to John Richardson precisely *what* charges might have technically been brought against him?[10]

Likewise, the trial judge ruled that Heath and Dumas were not proper subjects for an "informant" instruction because "the mere hope of getting something out of your testimony, in this Court's opinion, does not go to the heart of what that instruction talks to." (The Michigan Court of Appeals, for whatever reason, chose not to directly address the merits of this surprising proposition.)[11]

However, the record compels the conclusion that each of these crucial witnesses was operating under the same motivating factors that the accomplice and informant instructions are intended to address – the same kind of motivating factors (personal risk, personal gain, etc.) that undercut the reliability of their testimony:

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[10] Since it was petitioner's position that *no* murder had taken place, he could hardly have argued that Richardson was an accomplice to it. However, it will be recalled that Minauro had spoken of bringing a gun along to Jamie Latimer's house on the morning of the shooting, and Richardson said he had told him it sounded like a good idea. Richardson was questioned about whether he was concerned about "bringing an armed man over to do a rip off, maybe being thought to be a part of it" – exactly what petitioner said happened – and on this basis, defense counsel argued that Richardson may have been a knowing participant in a robbery attempt by Minauro.

[11] The proffered instruction described an informant as "someone who provides evidence against someone else in the hope of leniency, or to escape punishment for his own misdeeds or crimes, or for other personal reason or advantage."

> It has long been recognized that testimony of accomplices and informers raises particular credibility problems since these witnesses have strong incentives to fabricate or mold their testimony as the government desires in order to escape prosecution, lighten their sentences, obtain remuneration or receive protection. *See Cool v. United States*, 409 U.S. 100, 103, 93 S.Ct. 354, 357, 34 L.Ed.2d 335 (1972); *On Lee v. United States*, 343 U.S. 747, 757, 72 S.Ct. 967, 973-74, 96 L.Ed. 1270 (1952). Consequently, the defendant is entitled to broad latitude in probing the credibility of such witnesses by cross-examination, and to have the jury properly instructed. *See Hoffa v. United States*, 385 U.S. 293, 311-12, 87 S.Ct. 408, 418-19, 17 L.Ed.2d 374 (1966). Although no particular instruction is mandated, warning the jury to consider the testimony of an accomplice with great care and caution before relying on it is appropriate. *Marsh* [*United States*], 82 F.2d [703,] 704 [(3d Cir. 1936)] (citing *Caminetti v. United States*, 242 U.S. 470, 495, 37 S.Ct. 192, 198, 61 L.Ed. 442 (1917); *Crawford v. United States*, 212 U.S. 183, 203-04, 29 S.Ct. 260, 268, 53 L.Ed. 465 (1909).

United States v. Isaac, 134 F.3d 199, 204 (3d Cir. 1998).

It was the prosecution's burden to prove beyond a reasonable doubt that the petitioner did not, as he claimed, act in self-defense.[12] To do so, it relied solely and exclusively upon the testimony of witnesses who were operating under the kind of motivators which, in fairness,

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[12] Under Michigan law, "[o]nce evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v. Fortson*, 202 Mich. App. 13, 20 (1993).

should have been highlighted to the jury. Because the decision of the Sixth Circuit conflicts with the decisional law of other circuits, and is inconsistent with the decisions of this Court, the Court should grant *certiorari*, and reverse the decision below, squarely holding that in a case which depends wholly on the credibility of accomplice/informant witnesses, Due Process requires the kind of cautionary instruction which was refused in the case at bar.

CONCLUSION

The petitioner's conviction could only have been secured, and allowed to stand, in the face of significant deprivation of his rights to confrontation and due process. The decision below rests on serious misapprehensions of the Confrontation Clause and Due Process jurisprudence of this Court, and is in significant regards at odds with the decisions of other Circuits. Because of their importance, and the manifest need for guidance by the courts below, the Court should grant *certiorari* and give plenary consideration to the questions presented herein.

Respectfully submitted,

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Dated: September 8, 2004

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NOT RECOMMENDED FOR FULL – TEXT PUBLICATION

United States Court of Appeals,
Sixth Circuit.

James Lawrence LATIMER, Petitioner-Appellant,

v.

Sherry BURT, Warden, Respondent-Appellee.

No. 02-2221.

May 14, 2004.

On Appeal from the United States District Court for the Eastern District of Michigan.

N.C. Deday LaRene, LaRene & Kriger, Detroit, MI, for Petitioner-Appellant.

Laura Graves Moody, Brenda E. Turner, Office of the Attorney General, Lansing, MI, for Respondent-Appellee.

Before GUY, GILMAN, and COOK, Circuit Judges.

OPINION

GILMAN, Circuit Judge.

A Michigan jury found James Lawrence Latimer guilty of first-degree murder and of using a firearm during the commission of a felony. He was sentenced to life in prison without the possibility of parole for the murder conviction and an additional two years for the use of the firearm. The Michigan Court of Appeals affirmed Latimer's conviction, and his petition for leave to appeal was denied by the Michigan Supreme Court. Latimer then timely filed a petition for a writ of habeas corpus in the district court, arguing that the state trial court violated

his constitutional rights by limiting his cross-examination of three key witnesses and refusing to specifically instruct the jury regarding their credibility. The district court denied the petition. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

The prosecution's case against Latimer was based primarily upon the testimony of three witnesses: John Richardson, William Heath, and Matthew Dumas. The only witness to the shooting was Richardson, a mutual friend of Latimer and Robert Minauro. the victim in this case. Richardson testified that he acted as a middleman for a loan of $5,000 from Minauro to Latimer for the purchase of LSD. Latimer did not have the money to repay Minauro a month later, so he proposed to satisfy the loan obligation by selling Minauro a large quantity of discounted marijuana instead. At the meeting for the marijuana sale in August of 1997. Latimer shot and killed Minauro.

The state contended that Minauro was shot while he was inspecting a box that purportedly contained the marijuana. Latimer, on the other hand, claimed that he shot Minauro in self-defense. The day after the shooting, Richardson gave a statement to the police in which he said that Latimer was not defending himself when he shot and killed Minauro. But Richardson did not mention either the drugs or the loan when he gave his statement because he wanted to avoid implicating himself in the criminal activity.

During Latimer's trial, the state trial court prohibited Latimer from cross-examining Richardson regarding the

latter's testimony in an unrelated 1992 drug conspiracy trial in Iowa. Latimer contends that Richardson had falsely claimed to be an innocent bystander in the Iowa case, and that his prior testimony was therefore relevant to impeach his credibility in the present case, where Richardson again claimed to be an innocent bystander.

William Heath testified that he had been Latimer's prison cellmate in December of 1997. Latimer, according to Heath, repeatedly said that he shot Minauro in order to steal the money that Minauro had brought to the meeting for the purchase of the marijuana. Self-defense was never mentioned as a motive. At the time of Latimer's trial, Heath was the defendant in a separate criminal trial before the same judge. Heath was charged with conducting a criminal enterprise and with child sexual abuse, both arising from Heath's operation of an "adult entertainment" business that allegedly employed underage females. During Latimer's trial, the state court permitted defense counsel to cross-examine Heath regarding the existence of pending felony charges against him and the maximum possible penalties associated with those charges. But the court would not allow Latimer to inquire about the nature of Heath's business, the details of the pending felony charges, or his alleged "use of lies and deceit in the operation of his business."

The prosecution's third witness, Matthew Dumas, was a longtime acquaintance of Latimer. Dumas testified that Latimer had told him that Minauro was unarmed at the time of the shooting. Latimer asked the trial court for permission to cross-examine Dumas regarding "his numerous misdemeanors and petty offenses on the theory that Dumas was so frequently in front of the Oakland County Prosecutor that he might be trying to gain the

latter's favor." But the trial court prohibited Latimer from asking Dumas about either his overall criminal record or the allegedly false statements that Dumas had made to various judges in connection with his prior offenses.

At the close of proof, the trial court gave standard witness-credibility instructions to the jury. The jury was instructed to consider prior inconsistent statements to evaluate credibility, as well as any interest, bias, or personal interest in the case, or special reasons to lie. But the trial court refused Latimer's request to give specific instructions regarding the credibility of accomplices and informants.

II. ANALYSIS

A. Standard of review

We review de novo the district court's legal conclusions, but we will set aside its findings of fact only if they are clearly erroneous. *Lott v. Coyle,* 261 F.3d 594, 606 (6th. Cir.2001). The standard of review for state-court determinations, on the other hand, is dictated by the Antiterrorism and Effective Death Penalty Act (AEDPA), codified principally at 28 U.S.C. s 2254(d). AEDPA applies in the present case because Latimer filed his habeas petition in September of 2000, well after the Act's effective date of April 24, 1996. *See Harpster v. Ohio,* 128 F.3d 322, 326 (6th Cir.1997) (noting that AEDPA applies to habeas petitions filed after the Act's effective date). The Act provides in pertinent part as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the

merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. s 2254(d).

A state-court decision is "contrary to" federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In contrast, an "unreasonable application" of federal law occurs where a "state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

B. The trial court's restrictions upon Latimer's cross-examination of witnesses

The Confrontation Clause of the Sixth Amendment guarantees every criminal defendant the right "to be

confronted with the witnesses against him." U.S. Const. amend. VI. Under the Confrontation Clause, as interpreted by the Supreme Court, "cross-examination as to bias, motive or prejudice is constitutionally protected, but cross-examination as to general credibility is not." *Boggs v. Collins,* 226 F.3d 728, 737 (6th Cir.2000) (citing two Supreme Court cases). In *Boggs,* for example, the defendant in a rape case attempted to cross-examine the victim regarding an allegedly false accusation of rape that she had made against another man approximately one month before she accused the defendant. *Id.* at 733. The trial court sustained the prosecutor's objection to that line of questioning. *Id.* On appeal, this court held that the defendant's right of confrontation had not been violated because his "purpose in introducing the alleged prior false accusation was to attack [the victim's] general credibility." *Id.* at 739.

1. Allegedly false, prior statements by the witnesses

Boggs clearly holds that the Confrontation Clause does not give defendants the right to cross-examine witnesses regarding allegedly false statements where the defendant's theory of admissibility is that "if [the witness] lied or fabricated once, [he or] she would do so again." *Id.* In the present case, then, Latimer's right of confrontation was not violated by the trial court's decision to prohibit him from conducting cross-examination regarding Richardson's testimony in the Iowa case. Heath's "use of lies and deceit in the operation of his business," or Dumas's allegedly false statements to various judges. None of these prior statements demonstrates the existence of "bias, motive or prejudice" on the part of the witnesses. Instead,

the only viable theory of admissibility is that because the witnesses lied once, they would do so again.

2. Pending criminal charges against Heath

As for the pending criminal charges against Heath, the district court correctly observed that

> [b]y allowing cross-examination about the existence of the charges and the associated criminal penalties, the trial court allowed the jury to know why Heath might be testifying for the prosecution – in return for leniency on those charges – and how strongly those pending charges might be motivating him, in terms of the potential prison time he could be avoiding. . . . [A]ny further detail about the events underlying those pending charges would not serve the function of illustrating Heath's pro-prosecution bias, but rather would merely serve to impugn Heath's general credibility.

In sum, the trial court's decision to limit the cross-examination of Heath did not violate Latimer's rights under the Confrontation Clause.

3. Dumas's criminal record

Latimer also challenges the trial court's decision to prohibit him from cross-examining Dumas regarding the latter's "frequent troubles with the Oakland County Prosecutor." He argues that Dumas's recidivist behavior created a motive for Dumas to lie in the present case because helping the prosecutor's office would have been "like [putting] money in the bank." The district court, however, explained why this "speculative" theory of

Dumas's purported motive does not entitle Latimer to habeas relief pursuant to AEDPA:

> Dumas had no charges pending against him at the time of his testimony, so he had no existing motive to ingratiate himself with the prosecution. [Latimer's] theory that Dumas was a recidivist criminal and so perpetually motivated to curry favor with the prosecution is too speculative to qualify for relief. Although, in Dumas's case, [Latimer] technically has a theory of motive, it is one based entirely on guesswork: that Dumas *might* one day be back in front of the Oakland County Prosecutor, and so he was testifying falsely to prospectively curry favor with the prosecution. [Latimer] has not shown that prohibiting such a speculative question violated clearly established federal law, since the Supreme Court cases he relies on all involved present, existing impetuses for helping the prosecution. [*Delaware v.*] *Van Arsdall,* 475 U.S. [673,] 676, 106 S.Ct. 1431, 89 L.Ed.2d 674 [(1986)] (witness testified in exchange for having drunkenness charge dropped by prosecution); *Davis* [*v. Alaska*], 415 U.S. [308,] 311, 94 S.Ct. 1105, 39 L.Ed.2d 347 [(1974) To view preceding link please click here] (witness helped police while on probation for burglary); *Alford v. United States,* 282 U.S. 687, 693, 51 S.Ct. 218, 75 L.Ed. 624 (1931) ("petitioner was entitled to show by cross-examination that [witness's] testimony was affected by fear or favor *growing out of his detention*") (emphasis added).

In addition to the fact that the restriction upon the cross-examination of Dumas was not "contrary to . . . clearly established Federal law," 28 U.S.C. § 2254(d)(1), Latimer is not entitled to habeas relief on this issue

because any constitutional violation was harmless beyond a reasonable doubt. *See Van Arsdall,* 475 U.S. at 684 (holding that Confrontation Clause violations are subject to harmless-error analysis, and that all courts making that determination should consider "the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case").

The trial court permitted Latimer to cross-examine Dumas regarding related topics, including "offenses for which he was incarcerated at the time [Latimer] made the statements to him, his status at the time of [Latimer's] trial, whether he expected anything from the prosecutor's office, and his future expectations about being back in the court system." Dumas's testimony, moreover, was cumulative. His only material testimony was that Latimer had told him that Minauro was unarmed when Latimer shot him. But Richardson and Heath said essentially the same thing when they testified that the shooting was not in self-defense. Any error caused by limiting Latimer's cross-examination of Dumas was therefore harmless beyond a reasonable doubt.

C. The trial court's refusal to specifically instruct the jury regarding the credibility of accomplices and informants who serve as witnesses

In *United States v. Carr,* 5 F.3d 986 (6th Cir.1993), this court held that a district court's refusal to give a requested jury instruction is not reversible error so long as "the jury charge as a whole . . . fairly and adequately submits the

issues and the law to the jury." *Id.* at 992. "A refusal to give requested instructions is reversible error only if three conditions are met: (1) the instructions are correct statements of the law; (2) the instructions are not substantially covered by other delivered charges; and (3) the failure to give the instruction impairs the defendant's theory of the case." *Id.*

In the present case, the government points out that "[t]he jury was instructed to consider prior inconsistent statements to evaluate credibility, as well as any interest, bias, or personal interest in the case, or special reasons to lie." The requested instructions were therefore substantially covered by the delivered charges, which "alerted the jury to the various considerations that it should take into account in weighing testimony, [giving the jury] an ample basis for rejecting the testimony of the accomplice [and informant] witnesses if it had chosen to do so." *Id.* Latimer, moreover, presented no proof, and did not argue, that any of the witnesses in question were "accomplices," so the trial court's refusal to give the instruction regarding accomplices did not impair his theory of the case.

A trial court's refusal to give a specific jury instruction entitles a petitioner to habeas relief only if the omission "so infected the entire trial that the resulting conviction violates due process." *Henderson v. Kibbe,* 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977) (quotation marks omitted). In the present case, the state trial court's failure to give specific instructions regarding accomplice and informant credibility would not have constituted reversible error even if this were the direct appeal of a federal case, so relief is certainly not appropriate on a petition for habeas corpus.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JAMES LAWRENCE LATIMER,

Petitioner,

-v-

Case No. 2001-CV-60198
Hon. Marianne O. Battani

SHERRY BURT,

Respondent. /

OPINION AND ORDER OF THE COURT ADOPTING REPORT AND RECOMMENDATION DENYING WRIT FOR HABEAS CORPUS

I. INTRODUCTION

Petitioner, a Michigan prisoner, petitions this Court for a writ of habeas corpus under 28 U.S.C. § 2254, claiming to be held in violation of his constitutional rights. In his Petition, Petitioner raises two claims: 1) his Confrontation Clause rights were violated when he was improperly restricted in his cross-examination of prosecutorial witnesses; and 2) the instructions to the jury were improper regarding witness credibility. Before the court are Defendant's objections to Magistrate Judge Komives's Report and Recommendation, which recommends denying the Petition. Magistrate Judge Komives based his recommendation on the grounds that neither claim established a violation or unreasonable application of clearly established federal law. The Court agrees, and adopts the Report and Recommendation of the Magistrate Judge.

II. STANDARD OF REVIEW

In cases where a Magistrate Judge has submitted a Report and Recommendation and a party has properly filed objections to it, the district court must conduct a de novo review of those parts of the Report and Recommendation to which the party objects. 28 U.S.C. § 636(b)(1).[1]

Under 28 U.S.C. § 2254, a writ of habeas corpus may not be granted unless the state court proceedings 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or, 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)-(2). A decision of the state court is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412 (2000). An unreasonable application occurs when "the state court identifies the correct legal principle from [the Supreme] Court's decision but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 408. A federal habeas court may not find a state adjudication to be unreasonable "simply because that

[1] "A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411.

III. BACKGROUND

A. Procedural History

On April 15, 1998, Petitioner was convicted by an Oakland County jury in Circuit Court of first degree premeditated murder, **Mich. Comp. Laws** § 750.316, and felony-firearm, **Mich. Comp. Laws** § 750.227b. Petitioner was sentenced to life imprisonment without parole for the murder conviction plus two years for the felony-firearm conviction.

Petitioner appealed as of right to the Michigan Court of Appeals, asserting the claims in this petition, as well as a further claim that the trial court improperly failed to instruct the jury on the issue of imperfect self-defense. After the Court of Appeals affirmed, Petitioner unsuccessfully filed for leave to appeal the issues to the Michigan Supreme Court. He subsequently brought his two habeas issues to this Court in September 2001.

B. Factual Development

Petitioner was tried for the shooting death of Robert Minauro in the basement of Petitioner's home. At trial, Petitioner admitted to shooting Minauro but contended that he did so in self-defense. The prosecution relied heavily on the testimony of three witnesses: William Heath, John Richardson and Matthew Dumas. Richardson was the only other person present at the time of the shooting. At trial, he testified that he was a mutual friend

of Minauro and Petitioner, and was the middleman for a 100%-interest $5000 loan from Minauro to Petitioner to buy LSD. Richardson further testified that after buying the LSD, Petitioner could not pay Minauro the $10,000 owed, and persuaded Minauro to accept a large quantity of discounted marijuana in exchange. According to Richardson, however, at the meeting at which Petitioner was supposed to deliver the marijuana to Minauro, Petitioner instead shot Minauro while Minauro was inspecting a box. On the day after the shooting, Richardson gave a statement to the police in which he told of Petitioner shooting Minauro, and flatly denied that the shooting had been committed in self-defense. Richardson's statement, however, omitted the backstory to the shooting regarding the drugs and loans because he did not want to implicate himself. Heath testified that he was Petitioner's cellmate in Oakland County Jail in December 1997, and that during their incarceration at that facility, Petitioner confessed numerous times to shooting Minauro to rob him of his marijuana purchase money, rather than in self-defense. Dumas, a long-standing acquaintance of Petitioner's, testified that Petitioner's account of the shooting to him conceded that Minauro was unarmed when Petitioner shot him.

IV. PETITIONER'S HABEAS CLAIMS

Petitioner's first habeas issue asserts that he was improperly restricted in his cross-examination of Richardson, Heath and Dumas. Specifically, Petitioner sought to cross-examine Richardson about the latter's testimony in an unrelated 1992 drug conspiracy trial in Iowa, alleging that the testimony at issue impugned his credibility as a witness because in the Iowa case, he falsely claimed to be

an innocent bystander to a crime. With respect to Heath, Petitioner tried to cross-examine on three different topics: 1) pending charges against Heath that might have encouraged him to curry favor with the prosecution; 2) Heath's employment; and 3) Heath's use of lies and deceit in his business operations as symptomatic of his credibility. The trial court prohibited these lines of inquiry, except that it allowed Petitioner to cross-examine Heath as to the existence of the felony charges pending against him, including the possible penalties associated with those charges, without delving into the details of those charges. Finally, Petitioner unsuccessfully attempted to cross-examine Dumas about his numerous misdemeanors and petty offenses on the theory that Dumas was so frequently in front of the Oakland County Prosecutor that he might be trying to gain the latter's favor. Petitioner's second issue contends that the trial court impermissibly refused to instruct the jury that testimony from accomplices (i.e., Richardson) and informants (i.e., Heath and Dumas) is especially suspect and should be examined with great caution.[2]

ISSUE I: Alleged Confrontation Clause Violations

A. Report & Recommendation and Objections

Magistrate Judge Komives observed that while the Supreme Court has guaranteed criminal defendants the right to cross-examine adverse witnesses to expose their biases and bad motives for providing the specific testimony

[2] For a fuller statement of facts and procedural history, the Court adopts the statements of facts as set forth in the Report and Recommendation.

at issue, the Supreme Court has not yet extended Confrontation Clause protection over questions that only serve to impair an adverse witness's general credibility. *Davis v. Alaska,* 415 U.S. 308, 315-16 (1974) (defendant is constitutionally entitled to cross-examine about witness's motives in giving particular testimony, as distinguished from generally attacking witness's credibility); *Delaware v. Van Arsdall,* 475 U.S. 673, 678-80 (1986) (defendant constitutionally entitled to cross-examine witness about his motive to testify for prosecution); *accord Boggs v. Collins*, 226 F.3d 728, 736-37, 739-40 (6th Cir. 2000). The Report and Recommendation concluded that the cross-examination strategy in the instant case largely revolved around the witnesses' general credibility, not their biases or motives in testifying. For example, the questions to be posed to Richardson tried to expose him as a liar generally, as did the questions about Heath's employment and honesty in the conduction of his business. Magistrate Judge Komives conceded that the questions to Heath about his pending charges and to Dumas about his criminal recidivism were arguably perceivable as questions about their specific motives to testify for the prosecution, i.e., to curry favor with the prosecution. The Magistrate Judge still found no violation with respect to Heath because the trial court did allow Petitioner to expose the existence of Heath's felony convictions and charges, thus exposing the possible wellspring of Heath's bias. Regarding Dumas, Magistrate Judge Komives found Petitioner's recidivism theory too speculative to implicate Confrontation Clause concerns.

Petitioner objects that his questions to the three witnesses were related to their specific motives in testifying, not to their general credibility. In particular, Petitioner claims that his cross-examination would portray a

textured narrative of the witnesses that would tell the jury who the witnesses were and why they might testify the way they did. Petitioner does not contest the legal proposition, however, that the Supreme Court has only protected questioning over motives for specific testimony, and not over general credibility.

B. Discussion and Analysis

As the Sixth Circuit has explained in great detail, the Supreme Court has held that "cross-examination as to bias, motive or prejudice is constitutionally protected, but cross-examination as to general credibility is not." *Boggs,* 226 F.3d at 737 (citing *Davis,* 415 U.S. at 316; *Van Arsdall,* 475 U.S. at 678-80; *Olden v. Kentucky,* 488 U.S. 227, 232 (1988). Questioning about general credibility is not constitutionally protected even if the witness being cross-examined is centrally important to the prosecution's case. *Boggs,* 226 F.3d at 739-40. Moreover, the cross-examination must be geared with a specific theory of bad motive in place; it is not enough to question about general credibility in the hope that some bad motive or bias will precipitate out of the answers. *Id.* at 740-41.

The Report and Recommendation correctly dismissed the questioning to Richardson and to Heath about his general dishonesty and employment as an inquiry into general credibility. Petitioner's argument that the testimony was necessary as some kind of background information on the witnesses fails because it does not present any specific theory of bad motive to testify. As explained above, *Boggs,* applying Supreme Court precedent, mandates that the cross-examination must be conducted with the intent to expose a specific motive for testifying, not as a speculative

fishing expedition that hopes to expose some such yet-to-be-determined motive. *Id.* The trial court also properly handled the questions to Heath regarding his pending felony charges. By allowing cross-examination about the existence of the charges and the associated criminal penalties, the trial court allowed the jury to know why Heath might be testifying for the prosecution – in return for leniency on those charges – and how strongly those pending charges might be motivating him, in terms of the potential prison time he could be avoiding. The Report and Recommendation correctly surmised that any further detail about the events underlying those pending charges would not serve the function of illustrating Heath's pro-prosecution bias, but rather would merely serve to impugn Heath's general credibility.

Finally, the trial court permissibly barred the cross-examination of Dumas on his frequent troubles with the Oakland County Prosecutor. Dumas had no charges pending against him at the time of his testimony, so he had no existing motive to ingratiate himself with the prosecution. Petitioner's theory that Dumas was a recidivist criminal and so perpetually motivated to curry favor with the prosecution is too speculative to qualify for relief. Although, in Dumas's case, Petitioner technically has a theory of motive, it is one based entirely on guesswork: that Dumas *might* one day be back in front of the Oakland County Prosecutor, and so he was testifying falsely to prospectively curry favor with the prosecution. Petitioner has not shown that prohibiting such a speculative question violated clearly established federal law, since the Supreme Court cases he relies on all involved present, existing impetuses for helping the prosecution. *Van Arsdall,* 475 U.S. at 676 (witness testified in exchange for having

drunkenness charge dropped by prosecution); *Davis,* 415 U.S. at 311 (witness helped police while on probation for burglary); *Alford v. United States,* 282 U.S. 687, 693 (1931) ("petitioner was entitled to show by cross examination that [witness's] testimony was affected by fear or favor *growing out of his detention*") (emphasis added). Accordingly, Petitioner's Confrontation Clause claim fails.

ISSUE II: Jury Instructions

A. Report & Recommendation and Objections

The Magistrate Judge concluded that federal law does not confer any constitutional right to an instruction that accomplice witness testimony is especially suspect, and that even if it did so, such an instruction would not have been appropriate for Richardson because he was not an accomplice to the crime charged at all. Magistrate Judge Komives also opined that there is no habeas violation for failure to give an informant instruction to the jury.

Although Petitioner does not object that he was specifically entitled to accomplice or informant witness instructions, he argues that the failure to provide such instructions in this case was tantamount to an abdication of the trial court's responsibility to provide instructions on witness credibility.

B. Discussion and Analysis

A trial court does not have to give a specific instruction about accomplice witness credibility, as long as it has given a general instruction regarding witness credibility to the jury. *Scott v. Mitchell,* 209 F.3d 854, 883 (6th Cir. 2000). Moreover, a failure to give a particular jury instruction is

almost never proper grounds for habeas relief; a petitioner's burden on such a claim is heavier than that of a petitioner protesting an erroneous instruction. *E.g., Henderson v. Kibbe,* 431 U.S. 145, 155 (1977). Even a petitioner protesting an erroneous instruction faces a steep challenge in a habeas proceeding: he must show that the instruction so infected the entire trial that the resulting conviction violated due process, not merely that the instruction was erroneous or even universally condemned. *Id.* at 154. Thus, the petitioner must show that the failure to give the informant instruction fundamentally prejudiced his trial so that it violated due process.

Here, as the Report and Recommendation notes without disagreement from Petitioner, the trial court did in fact give standard witness credibility instructions to the jury. Thus, there was no need to give instructions on accomplice or informant credibility in particular. Furthermore, Petitioner has not delineated any specific prejudice or fundamental unfairness wrought by the failure to give the requested instructions, rendering his habeas claims deficient. *See, e.g., Smith v. Gibson,* 197 F.3d 454, 460 (10th Cir. 1999) (finding no fundamental unfairness where "trial court instructed jurors that it remained their responsibility to determine a witness's credibility, after considering, among other things, any bias, prejudice or interest the witness might have"). Petitioner cites to *Carella v. California,* 491 U.S. 263, 265 (1989), for the proposition that the trial court failed to execute its duty to instruct the jury on witness credibility, but *Carella* is wholly inapposite because it dealt with instructions that a jury need not presume a criminal defendant's innocence beyond a reasonable doubt. *Id.* Not only does *Carella* have nothing to do with credibility instructions, but it deals

with a clear due process violation: advising a jury that it did not have to find all of the elements of a crime to be established beyond a reasonable doubt. In conclusion, Petitioner's habeas claim based on the jury instructions must also fail.

V. CONCLUSION

For the reasons set forth above, the Court ADOPTS Magistrate Judge Komives's Report and Recommendation DENYING Petitioner's application for a writ of habeas corpus.

IT IS SO ORDERED.

DATE: 9/25/02

/s/ Marianne O. Battani
Hon. Marianne O. Battani

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JAMES LAWRENCE LATIMER, Defendant-Appellant.	UNPUBLISHED March 28, 2000 No. 212172 Oakland Circuit Court LC No. 97-155535-FC

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant first claims that he was denied a fair trial and his constitutionally guaranteed right of confrontation by the trial court's restrictions on his cross-examination of three prosecution witnesses. We disagree. Defendant has not shown a violation of his rights under the Confrontation Clause, which protects a defendant's right for a reasonable opportunity to test the truthfulness of a witness' testimony. *People v Ho,* 231 Mich App 178, 189-190; 585 NW2d 357 (1998); *People v Adamski,* 198 Mich App 133, 138; 497 NW2d 546 (1993). Further, giving due regard to our de novo review of preliminary questions of law affecting the

admissibility of evidence, we are not persuaded that the trial court's evidentiary rulings were an abuse of discretion under the Michigan Rules of Evidence. *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999).

The trial court's limitation on the cross-examination of witness Richardson regarding his prior testimony, in the face of defendant's proffered use of the evidence under MRE 608(b) and MRE 404(b), was not an abuse of discretion. MRE 608(b) provides a trial court discretion to allow inquiry into specific instances of conduct of a witness concerning his character for truthfulness or untruthfulness, but does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters relating only to credibility. The trial court's discretion under MRE 608(b) is also subject to MRE 403, which permits a trial court to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" *People v Brownridge,* 459 Mich 456, 464; 591 NW2d 26 (1999), amended 459 Mich 1276 (1999).

We agree with defendant that evidence that Richardson gave false prior testimony under oath would be probative of his character for truthfulness. However, an inquiry on cross-examination into whether Richardson made certain statements under oath at his 1992 federal trial on marijuana-related charges and 1997 preliminary examination in this case would not, by itself, establish by inference the relevant fact, namely, a false statement under oath, because there was no testimony elicited at the 1997 preliminary examination that Richardson's statements pertained to the same incident underlying the 1992 trial. Moreover, even if the statements did pertain to the same incident and could be viewed as inconsistent, this would

not necessarily indicate that Richardson's statements at his 1992 trial were the false statements. Defendant would be stuck with any answer that Richardson provided because MRE 608(b) does not allow extrinsic evidence of the specific acts. *People v Lester,* 232 Mich App 262, 276; 591 NW2d 267 (1998).

In any event, the trial court's ruling to limit the cross-examination of Richardson reflects that the court applied MRE 403, finding that the proffered evidence was not particularly probative because it did not reflect bias or a tendency on the part of Richardson to make false accusations and that the court weighed the probative value of the evidence against the prejudicial effect of adding "a level of complexity to the jury's task." We are not persuaded that the trial court abused its discretion in applying MRE 403. *Brownridge, supra.*

We reject defendant's claim that he presented a proper foundation for cross-examining Richardson about his prior testimony under MRE 404(b). Unlike MRE 608(b), which is concerned with a witness' character for truthfulness or untruthfulness, MRE 404(b) requires evidence relevant to a noncharacter theory. *People v Starr,* 457 Mich 490, 496; 577 NW2d 673 (1998). Defendant's offer to show a plan, system, or scheme on the part of Richardson to avoid criminal responsibility by falsely claiming to be an innocent bystander failed to satisfy any of the standards for admission under MRE 404(b). *Starr, supra* at 496; *Ho, supra* at 185. The commonality between Richardson's alleged prior act and defendant's trial was drugs. However, Richardson did not claim to be an innocent bystander in the instant case, with no knowledge of or involvement in drug transactions. Further, given defendant's admission that he killed the victim (albeit in self-defense), the fact of

consequence at defendant's trial concerning Richardson's testimony was whether Richardson gave truthful testimony regarding his eyewitness observations of the shooting (e.g., that the victim did not have a gun). Even if defendant could have shown that Richardson gave false testimony at his 1992 trial, that act is not logically linked to the ultimate inference sought by defendant about Richardson lying at trial about the killing. At best, the proposed evidence was shown to have a bearing on Richardson's character for truthfulness. Hence, the trial court did not abuse its discretion in excluding the evidence on the proffered innocent bystander theory. *People v Crawford,* 458 Mich 376, 390; 582 NW2d 785 (1998).

Furthermore, even if the trial court abused its discretion, as previously stated, defendant was afforded a reasonable opportunity to test the truthfulness of Richardson's credibility. In this regard, we note that the jury had ample evidence of other prior statements made by Richardson to evaluate his credibility. Although not made under oath, the statements were related to the instant case. Specifically, Richardson testified that he had lied or withheld information in this case about drug transactions, when first interviewed by detectives, because he did not want to be implicated in drug charges. Given this record, we are not persuaded that defendant's substantial rights were affected by the limitation placed on the cross-examination by the trial court. MRE 103(d). See also *People v Carines,* 460 Mich 750, 774; 597 NW2d 130 (1999).

With regard to the two witnesses, Heath and Dumas, who testified about statements made to them by defendant about the killing, we are likewise not persuaded that the trial court abused its discretion in limiting the scope of

cross-examination on matters affecting their character for truthfulness or untruthfulness. MRE 609(b); MRE 403; *Brownridge, supra.* See also *People v Fuzi #1,* 116 Mich App 246; 323 NW2d 354 (1982). Further, defendant has not established an abuse of discretion relative to any proffered noncharacter purpose of the cross-examination by his trial attorney, such as bias or motive, for either witness. *Lukity, supra* at 488. We reject defendant's claim that his trial attorney should have been allowed to cross-examine Dumas regarding his recidivist criminal behavior to show that "helping the Prosecutor's office is like money in the bank" to Dumas because he was likely to be back in the criminal system. Defendant's trial attorney was given a reasonable opportunity to cross-examine Dumas about offenses for which he was incarcerated at the time defendant made the statements to him, his status at the time of defendant's trial, whether he expected anything from the prosecutor's office, and his future expectations about being back in the court system. Even if Dumas would have admitted to the recidivist criminal behavior during cross-examination, the proposed use of this testimony to predict his likelihood for future criminal conduct would have run afoul of the prohibition against the use of evidence of other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith. MRE 404(b). Although such evidence may be admissible for a noncharacter purpose, defendant did not weave a logical thread between Dumas' prior acts (various prosecutions) and the ultimate inference sought (Dumas' interest in testifying against defendant). *Crawford, supra* at 390. Thus, the trial court's limitation of the cross-examination of Dumas relative to this theory was not error.

Defendant next claims that the trial court erred in denying his requested instructions based on CJI2d 5.5 and 5.6, and a separate informant instruction. We disagree. Defendant's claim that CJI2d 5.5 and 5.6 were justified because of evidence that Richardson was involved in the murder is not properly before us, given that trial counsel conceded at trial that Richardson was not implicated in the murder. A "defendant may not allow an error to pass in the trial court, or request an action that may constitute error, and subsequently seek redress in this Court." *People v Buck,* 197 Mich App 404, 423; 496 NW2d 321 (1992), modified 444 Mich 853 (1993). In any event, an unmodified version of CJI2d 5.5 would not have been proper because there was no evidence that Richardson knowingly and willingly helped or cooperated in the killing. *People v Allen,* 201 Mich App 98, 105; 505 NW2d 869 (1993). Under the standard jury instruction, Richardson must have been an accomplice for the crime for which defendant was charged. *Ho, supra* at 189.

Further, while trial judges are not required to use standard criminal jury instructions, *People v Petrella,* 424 Mich 221, 277; 380 NW2d 11 (1985), defendant has not shown that the modified version of CJI2d 5.5 or the requested informant instruction was necessary to protect his rights and fairly present the credibility issues to the jury. *People v Bartlett,* 231 Mich App 139, 143-144; 585 NW2d 341 (1998). The rationale for a cautionary instruction on "accomplice" testimony is that such testimony, when presented by the prosecution, is inherently weak. *People v Reed,* 453 Mich 685, 691; 556 NW2d 858 (1996). The problems with such testimony are that (1) actual or implied threats or promises of leniency by the prosecution often induce an accomplice to fabricate testimony, and (2)

a jury may rely on otherwise incredible accomplice testimony simply because it is presented by the prosecution. *Reed, supra* at 692. A trial court should ordinarily give the instruction when requested, but there is no rule of automatic reversal, even in a closely drawn case. *Reed, supra* at 692. "Closely drawn" has been construed as involving cases where the trial is a credibility contest between the defendant and an accomplice. *Buck, supra* at 415.

In the case at bar, an accomplice instruction modified to include criminal activities other than the crime for which defendant was tried, as requested by trial counsel, might have confused the jury. *Ho, supra* at 189. Further, while Richardson was a prosecution witness, the difficulty with his credibility was plainly apparent from the testimony elicited regarding his prior statements made to avoid being implicated in drug activities. *Reed, supra* at 693. The jury was instructed to consider prior inconsistent statements to evaluate credibility, as well as any interest, bias, or personal interest in the case, or special reason to lie. Moreover, this was not a closely drawn case because it did not involve a credibility contest between Richardson and defendant. The jury had other proofs, including the jail inmates' testimony about defendant's statements and the medical examiner's testimony about the range from which the gunshot was fired, to determine if the prosecution sufficiently proved a premeditated and deliberate killing in the face of defendant's claim of self-defense. Examined in this context, we conclude that the trial court's refusal to give the requested instructions was not error. *Bartlett, supra.*

Finally, defendant claims that the trial court erred by not giving a requested instruction on imperfect self-defense. We find it unnecessary to decide this issue

because defendant was found guilty of first-degree murder. Imperfect self-defense is a qualified defense for reducing second-degree murder to voluntary manslaughter. *People v Deason,* 148 Mich App 27, 31; 384 NW2d 72 (1985). In passing, we note that the trial court correctly followed Michigan law when holding that the requested instruction was improper. Imperfect self-defense is limited to circumstances where a defendant would have had a right to lawful self-defense but for his actions as the initial aggressor. *People v Kemp, 202* Mich App 318, 323; 508 NW2d 184 (1993); *People v Butler,* 193 Mich App 63, 67; 483 NW2d 430 (1992).

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry W. Saad

618 N.W.2d 594

463 Mich. 877

(The decision of the Court is referenced in the North Western Reporter in a table captioned "Supreme Court of Michigan Applications for Leave to Appeal.")

Supreme Court of Michigan

People

v.

James Lawrence Latimer

NO. 116688. COA. No. 212172.

September 26, 2000

Disposition: Application for leave to appeal from the March 28, 2000 decision of the Court of Appeals is DENIED.

Case No: 02-2221

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Jun. 14, 2004)

JAMES LAWRENCE LATIMER

Petitioner-Appellant

v.

SHERRY BURT, Warden

Respondent-Appellee

BEFORE: GUY, GILMAN, and COOK, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green/JB
Leonard Green, Clerk

(2)
FILED
No. 04 415 SEP 10 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAMES LAWRENCE LATIMER,

Petitioner,

v.

SHERRY BURT, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES LAWRENCE LATIMER,

Petitioner,

v.

SHERRY BURT,

Respondent. /

CASE NO. 01-CV 60198-AA

JUDGE MARIANNE O. BATTANI

MAGISTRATE JUDGE PAUL J. KOMIVES

REPORT AND RECOMMENDATION

(Filed Jun. 17, 2002)

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I. RECOMMENDATION: The Court should deny petitioner's application for the writ of habeas corpus.

II. REPORT:

A. *Procedural History*

1. Petitioner James Lawrence Latimer is a state prisoner, currently confined at the Southern Michigan Correctional Facility in Jackson, Michigan.

2. On April 15, 1998, petitioner was convicted of one count of first degree premeditated murder, MICH. COMP. LAWS § 750.316, and one count of possessing a firearm during the commission of a felony, MICH. COMP. LAWS § 750.227b, following a jury trial in the Oakland County Circuit Court. On May 22, 1998, he was sentenced to a mandatory term of life imprisonment without possibility of parole on the murder conviction, and to a mandatory consecutive term of two years' imprisonment on the firearm conviction.

3. Petitioner appealed as of right to the Michigan Court of Appeals, raising the following claims:

> I. DEFENDANT APPELLANT WAS DENIED A FAIR TRIAL, AND HIS CONSTITUTIONALLY GUARANTEED RIGHTS OF CONFRONTATION, BY THE TRIAL COURTS IMPROPER RESTRICTIONS ON HIS CROSS-EXAMINATION OF THE KEY PROSECUTION WITNESSES.

II. DEFENDANT-APPELLANT WAS DENIED A FAIR TRIAL BY THE COURTS' INSTRUCTIONS TO THE JURY, WHICH DID NOT FAIRLY CAUTION THE JURY REGARDING CRITICAL QUESTIONS OF WITNESS CREDIBILITY, AND DID NOT PRESENT THE JURY WITH THE ISSUE OF IMPERFECT SELF-DEFENSE.

The court of appeals found no merit to petitioner's claims, and affirmed the conviction and sentence. *See People v. Latimer,* No. 212172, 2000 WL 33521031 (Mich. Ct. App. Mar. 28, 2000) (per curiam).

4. Petitioner sought leave to appeal these issues to the Michigan Supreme Court. The Supreme Court denied petitioner's application for leave to appeal in a standard order. *See People v. Latimer,* 463 Mich. 877, 618 N.W.2d 594 (2000).

5. Petitioner, through counsel, filed the instant application for a writ of habeas corpus on September 26, 2001. He raises the same grounds for writ of habeas corpus that he raised in the Michigan Court of Appeals, except that his claim of instructional error is limited to the court's credibility instructions, and omits his claim that the court should have instructed the jury on imperfect self-defense.

6. Respondent filed her answer on April 8, 2002. She contends that petitioner's claims are without merit.

B. *Factual Background*

Petitioner was convicted of murder in connection with the August 26, 1997, shooting death of Robert Minauro in the basement of petitioner's home. Petitioner did not

dispute that he shot Minauro, but contended at trial that he did so in self-defense. Although other evidence was presented at trial, the principal evidence against petitioner came from three witnesses – William Heath, John Richardson, and Matthew Dumas – and it is their testimony that is relevant to petitioner's habeas claims.

Richardson was the only other person present at the time of the shooting. He was a friend of both petitioner and Minauro. *See* Trial Tr., Vol. III, at 52-55. He testified that, in July of 1997, Minauro gave him $5000, which he in turn gave to petitioner. Petitioner had asked Richardson if he could get some money so that petitioner could purchase some LSD in California. The money was a loan, to be repaid in 30 days at double the amount of the loan. Richardson characterized himself as a sort of "middle man" in the loan transaction. *See id.* at 56-57. Richardson gave the money to petitioner, and told him to be prepared to pay back $10,000 in 30 days. Several days later, petitioner returned from California with a large quantity of LSD. *See id* at 57-63.

Several days before the repayment was due, petitioner told Richardson that he would not be able to repay the money. Minauro demanded to meet with petitioner, and a meeting was arranged for August 19, at petitioner's home. At the meeting, Minauro demanded his money and threatened petitioner with physical harm, but did not threaten to kill him and did not have any weapon on him. *See id.* at 63-68. Richardson spoke with petitioner later in the day, and petitioner threatened to kill Minauro. *See id.* at 69.

Richardson arranged a second meeting between petitioner and Minauro to discuss the repayment situation. This meeting took place at a restaurant on August

25. *See id.* at 69-70. At that meeting, petitioner wanted Minauro to come up with an additional $15,000 so that petitioner could purchase 150 pounds of marijuana. The profit from the resale would be used to repay the initial $10,000 and the additional $15,000. *See id.* at 70-73. A meeting was arranged for the next day, when the marijuana was supposed to be delivered, at petitioner's home. *See id.* at 74. After the meeting at the restaurant, petitioner told Richardson that he was going to kill Minauro. *See id.* at 75.

The following day, August 26, Richardson contacted Minauro at about 11 a.m., and Minauro arrived at Richardson's home about a half hour later. Richardson then called petitioner to tell them that they could do the deal. Richardson and Minauro traveled to petitioner's house together, in Minauro's car. They had with them a digital scale to weigh the marijuana, which was kept in a duffel bag. *See id.* at 78-80, 84-85. After arriving at petitioner's house, the three eventually went down into petitioner's basement to complete the transaction. Petitioner told Minauro that the marijuana was in a box in a corner of the basement. Minauro bent down and looked through the box, but was unable to find anything. As he stood back up petitioner, who was standing about nine feet away, shot Minauro. Richardson did not hear Minauro say anything. *See id.* at 95-100.

After the shooting, Richardson attempted to take the gun away from petitioner. Petitioner pulled back, and Richardson pleaded not to be shot. Petitioner indicated that he was not going to shoot Richardson, and the two went upstairs. As they did so, petitioner was crying and saying that he "didn't want to do it." Richardson eventually secured

the gun and emptied the bullets before returning it to petitioner. *See id.* at 101-09.

On the following day, petitioner called Richardson, and Richardson advised petitioner to turn himself in to the police. Petitioner called Richardson a second time, and Richardson recorded the call. *See id.* at 122-23. Richardson went to the Oakland County Sheriff's Department later in the day, and gave a statement to detectives. He did not tell the detectives about the loan of the money and the drug transactions because he did not want to implicate himself. *See id.* at 127-29. Richardson testified that Minauro did not have a gun or any other weapon on the day of the murder and never threatened petitioner at any time, and that petitioner did not indicate at any time that he was frightened by Minauro. He testified that there was no self-defense involved in the shooting. *See id.* at 130-32.

Although Richardson's testimony was most central to its case, the prosecution also relied heavily on the testimony of Heath and Dumas. Heath testified that he was an inmate at the Oakland County Jail and shared a cell with petitioner in December 1997. Heath testified that petitioner, over the course of several conversations, admitted to shooting Minauro, and indicated that he did so to rob Minauro of the money he was supposedly bringing to purchase the marijuana. Petitioner admitted that Minauro did not have a gun and had not threatened him. *See id.* at 15-21. Dumas testified that he had known petitioner for a number of years, and saw him in the clinic at the Oakland County Jail. Dumas, aware of the pending murder charge, asked petitioner what had happened. Petitioner indicated that, as they were going down the stairs to the basement, Minauro put something in his back, and indicated that he was going to rob petitioner of the marijuana. When

Minauro came from behind him to look at the marijuana, petitioner had a chance to shoot and did so. Petitioner did not indicate to Dumas that Minauro was armed, or that he had placed a weapon in petitioner's back. *See* Trial Tr., Vol. V, at 14-23.

C. *Standard of Review*

Because petitioner's application was filed after April 24, 1996, his petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). *See Lindh v. Murphy,* 521 U.S. 320, 326-27 (1997). Amongst other amendments, the AEDPA amended the substantive standards for granting habeas relief by providing:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court recently explained the operation of § 2254(d)(1). In *Williams v. Taylor,* 529 U.S. 362 (2000),

the Court explained that "the 'contrary to' and 'unreasonable application'. clauses [have] independent meaning." *Id.* at 405.[1] With respect to the "contrary to" clause, the Court explained that a state court decision will be contrary to clearly established law in two situations. First, "a state-court decision will certainly be contrary to . . . clearly established precedent if the state applies a rule that contradicts the governing law set forth in [the Court's] cases." *Id.* Second, "a state-court decision will also be contrary to [the] Court's clearly established precedent if that state court confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the Court's] precedent." *Id.* at 406. "On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from [the Court's] cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Id.* Such a case is therefore governed by the "unreasonable application" language of § 2254(d)(1).

With respect to the "unreasonable application" language, the Court provided somewhat less guidance. The Court did reject the subjective "not debatable among reasonable Jurists" standard that had been adopted by a

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[1] The following discussion comes from Part II of Justice O'Connor's opinion in *Williams*. Although Justice Stevens wrote the opinion for the Court in several other respects, Part II of his opinion, in which he discusses the standard or review under § 2254(d)(1), was joined only by three other Justices (Justices Souter, Ginsberg, and Breyer). Part II of Justice O'Connor's opinion, also discussing the standard of review, was joined by four other Justices (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas). Thus, Justice O'Connor's opinion constitutes the opinion of the Court with respect to the standard of review under the AEDPA (except for one footnote, citing to legislative history, in which Justice Scalia did not join).

number of Courts of Appeals. *See id.* at 409-10. And the Court clarified that "an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 410. Beyond that however, the Court simply noted that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable," *id.* at 409, and explained that "[t]he term 'unreasonable' is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Id.* at 410; *cf. Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J.) (noting that "obscenity" is hard to define "[b]ut I know it when I see it.").

By its terms, § 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with "clearly established federal law as determined by the Supreme Court." Thus, "§ 2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." *Williams,* 529 U.S. at 412.[2] Further, the "phrase refers to the holdings, as

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[2] This does not mean, however, that the decisions of lower federal courts are entirely irrelevant. First of all, this Court is bound by pertinent decisions of the United States Court of Appeals for the Sixth Circuit. *See Timmreck v. United States*, 577 F.2d 372, 374 n.6 (6th Cir. *1978), rev 'd on other grounds,* 441 U.S. 780 (1979); *Conrad v. Rofin-Sinar, Inc.*, 762 F. Supp. 167, 172 (E.D. Mich. 1978). Thus, to the extent that the Sixth Circuit has held that certain Supreme Court cases "clearly establish" federal law in certain respects, this Court is bound by those determinations, regardless of whether this Court would interpret the Supreme Court precedent differently. Further, although the federal court is limited to Supreme Court precedent in determining whether a particular right is clearly established, "[t]o the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of

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opposed to the dicta, of [the] Court's decisions as of the time of the relevant state-court decision." *Id.* However, the Supreme Court need not have decided a factually identical case for the law to be "clearly established;" rather, the law is clearly established to the extent that the relevant Supreme Court precedent fairly can be said to require a particular result or a particular mode of analysis given the facts and legal claims involved in the petitioner's case, regardless of whether the Supreme Court has decided the precise issue presented. *See id.* at 391 (internal quotation and citation omitted) (that a particular test "of necessity requires a case-by-case examination of the evidence obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by [the] Court.").[3]

D. *Confrontation Claims (Claim I)*

Petitioner first contends that he was denied his right to confront the witnesses against him by the trial court's limitations on his cross-examination of Richardson, Heath, and Dumas. At trial, petitioner sought to cross-examine Richardson concerning a 1992 trial in the United States District Court for the Southern District of Iowa, in connection with a drug conspiracy. Petitioner sought to question Richardson about his testimony at that trial on two bases: "first, that it constitutes clear evidence of perjury, and so is clearly relevant to credibility, and, second, because his

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the state court's treatment of the contested issue." *O'Brien v. DuBois*, 145 F.3d 16, 25 (1st Cir. 1998).

[3] This language is from Part III of Justice Stevens's opinion, which was joined by a majority of the Court.

conduct in that case – of seeking to avoid criminal responsibility by falsely claiming to have been merely an unwitting, innocent bystander, so closely echoes his conduct in the case at bar as to be admissible as evidence of plan, system, and scheme." Mem. Br. in Supp. of Pet. for Writ of Habeas Corpus, at 12.

With respect to Heath, petitioner sought to explore three areas on cross-examination. First, he wanted to question Heath about a hearing on a motion to reduce bond which Heath filed in relation to another case on which he was incarcerated. At the hearing, it came out that Heath had attempted to tamper with witnesses and destroy evidence in that case. Petitioner sought to question Heath about these matters because, in light of the pending charges against Heath, he might have a motive to offer testimony helpful to the prosecution. Second, petitioner sought to question Heath about his employment, to place Heath in the context of the community." Third, petitioner wanted to question Heath about his use of lies and deceit in the operation of his business, as such evidence would bear on Heath's credibility. The trial court prohibited most of this testimony, but did allow cross-examination on the fact that Heath had felony charges pending against him and the possibly penalties should Heath be convicted of those charges. *See* Trial Tr., Vol. III, at 7-8.

Finally, with respect to Dumas, petitioner sought to cross-examine him concerning his numerous previous misdemeanors and petty offenses. Petitioner theorized that, because Dumas had so often been prosecuted for such offenses and violated the terms of his probation, he was likely to come before the Oakland County Prosecutor again, and therefore had a motive to testify favorably to the prosecution. Petitioner also sought to question Dumas

about lies he had told to judges in connection with these cases.

Petitioner argues that the trial court denied him his right to confront the witnesses against him by limiting his cross-examination on these matters. The Court should conclude that neither the trial court's rulings nor the court of appeals's affirmance of those rulings resulted in a decision which was contrary to, or which involved an unreasonable application of, clearly established federal law.

1. *Clearly Established Law*

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Confrontation Clause is applicable to the states through the 14th Amendment's Due Process Clause. *Pointer v. Texas,* 480 U.S. 400, 406 (1965). The Supreme Court's "Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." *Delaware v. Fensterer,* 474 U.S. 15, 18 (1985) (per curiam). The latter category, which is implicated in petitioner's claims, recognizes that "[c]onfrontation means more than being allowed to confront the witness physically." *Davis v. Alaska,* 415 U.S. 308, 315 (1974). Thus, in cases where the trial court has restricted cross-examination in some manner, "the Court has recognized that Confrontation Clause questions will arise because such restrictions may 'effectively . . . emasculate

the right of cross-examination itself.'" *Fensterer,* 474 U.S. at 19 (quoting *Smith v. Illinois,* 390 U.S. 129, 131 (1968)).

However, the Supreme Court has also explained that the Confrontation Clause does not "guarantee cross-examination that is effective in whatever way and to whatever extent the defense might wish." *Fensterer,* 474 U.S. at 20. The question is whether the trial court's ruling allowed for "substantial compliance with the purposes behind the confrontation requirement," or, put another way, whether petitioner was "significantly limited in any way in the scope or nature of his cross-examination." *Green,* 399 U.S. at 166. Thus, "[s]o long as cross-examination elicits adequate information to allow a jury to assess a witness's credibility, motives, or possible bias, the Sixth Amendment is not compromised by a limitation on cross-examination." *United States v. Cueto,* 151 F.3d 620, 638 (7th Cir. 1998); *see also, United States v. Larranaga,* 787 F.2d 489, 498 (10th Cir. 1986).

2. *Analysis*

In support of his claim, petitioner relies principally upon the Supreme Court's decision in *Davis v. Alaska, supra.* In that case, the Court held that the Sixth Amendment right to confront witnesses guarantees a criminal defendant the right to cross-examine adverse witnesses to expose bias and motivations for testifying. *See id.* at 315-16; *see also, Delaware v. Van Arsdall,* 475 U.S. 673, 678-80 (1986). However, the *Davis* Court limited its Confrontation Clause decision to those facts going to a witness's bias or motive in testifying, as opposed to general attacks on credibility. The Court's decision in *Van Arsdall* was similarly limited. Indeed, in his concurring opinion in *Davis,*

Justice Stewart emphasized that the *Davis* "Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination" concerning past convictions. *Davis,* 415 U.S. at 321 (Stewart, J., concurring).

Thus, there is no clearly established federal law as determined by the Supreme Court, within the meaning of § 2254(d)(1), which establishes a criminal defendant's right to cross-examine a witness to expose issues relating to general credibility, as opposed to bias and motives for testifying. As the Sixth Circuit has explained:

> although *Davis* trumpets the vital role cross-examination can play in casting doubt on a witness's credibility, not all conceivable methods of undermining credibility are constitutionally guaranteed. In particular, the *Davis* Court distinguished between a "general attack" on the credibility of a witness – in which the cross-examiner "intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony" – and a more particular attach on credibility "directed toward revealing possible biases, prejudices, or ulterior motives as they may relate directly to issues or personalities in the case at hand."

Boggs v. Collins, 226 F.3d 728, 736 (6th Cir. 2000) (quoting *Davis,* 415 U.S. at 316). The Court in *Davis* found only the latter, particularized attack on bias and motivation, to be a protected aspect of the right to confrontation. *See Boggs,* 226 F.3d at 737. As the Sixth Circuit explained in *Boggs,* "[c]ourts after *Davis* and *Van Arsdall* have adhered to the distinction drawn by those cases and by Justice Stewart in his concurrence – that cross-examination as to bias,

motive or prejudice is constitutionally protected, but cross-examination as to general credibility is not." *Boggs,* 226 F.3d at 737; *see also, Quinn v. Haynes,* 234 F.3d 837, 844-45 (4th Cir. 2000); *Reiger v. Christensen,* 789 F.2d 1425, 1433 (9th Cir. 1986).

Here, most of the areas which petitioner wished to explore on cross-examination of Richardson, Heath, and Dumas went to general credibility. Richardson's alleged perjury in the federal trial in Iowa, Heath's attempts at witness tampering and his employment background and use of lies in his business, and Dumas' previous convictions and representations to the state courts all went to the general credibility of the witnesses. It matters not, as petitioner attempts to emphasize, that the credibility of these witnesses was central to the prosecution's case:

> No matter how cental [sic] an accuser's credibility is to a case . . . the Constitution does not *require* that a defendant be given the opportunity to wage a general attack on credibility by pointing to individual instances of past conduct. In other words, [petitioner]'s argument that credibility is crucial to this case, and that therefore any evidence bearing on credibility must be allowed in, simply does not reflect Sixth Amendment caselaw. Under *Davis* and its progeny, the Sixth Amendment only compels cross-examination if that examination aims to reveal the motive, bias or prejudice of a witness/accuser.

Boggs, 226 F.3d at 740 (emphasis in original).

The only two areas of cross-examination limited by the trial court which arguably went to bias or motive were Heath's pending criminal charges, which went to his motive to testify favorably to the prosecution, and Dumas's

recurring appearance before the courts on misdemeanor charges. As to Heath, petitioner was allowed to bring out the fact of his pending charges and the possible sentences he faced. Although petitioner was precluded from going into the details of each charge, this information was sufficient to point out to the jury Heath's motivation to testify favorably to the prosecution, which is all that the Confrontation Clause requires. *See Boggs,* 226 F.3d at 739 (if trial court impermissibly restricts cross-examination on motive or bias, relief is still not available if "the jury had enough information, despite the limits placed on otherwise permitted cross-examination, to assess the defense theory of bias or improper motive."). As to Dumas, he had no charges pending at the time of his testimony; petitioner merely speculated that, due to Dumas's recidivist nature he would again be before the prosecutor and courts, and thus had a motive to testify favorably to the prosecution. *See United States v. Ong,* 541 F.2d 331, 342 (2d Cir. 1976) ("We do not believe that the Court in *Davis* meant to sanction speculative expeditions into areas only tangentially related to the facts in issue in the hope that some basis for implying an ulterior motive might be found.").[4]

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[4] Petitioner relies primarily on *Davis* and *Van Arsdall* in support of his claim. I have explained above why these cases do not support petitioner's claim for relief. Petitioner also relies heavily on two other cases, *Alford v. United States,* 282 U.S. 687 (1931) and *Olden v. Kentucky,* 488 U.S. 227 (1988). Neither of these cases supports petitioner's confrontation claims. Both of these cases were bias/motive cases, not general credibility cases. *See Alford,* 282 U.S. at 693; *Olden,* 488 U.S. at 231-32. The Supreme Court has repeatedly described *Alford* as a bias/motive case. *See Davis,* 415 U.S. at 317-18; *United States v. Abel,* 469 U.S. 45, 49 (1984). And, although the Supreme Court has not cited *Olden* since that case was decided, the federal courts of appeals likewise describe *Olden* as a bias/motive case. *See Boggs,* 237 F.3d at 737; *Quinn,* 234 F.3d at 844. Thus, for the same reasons that *Davis* and

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Finally, even if there was some restriction by the trial court on legitimate cross-examination, petitioner cannot show that he is entitled to habeas relief. As noted above, even where proper cross-examination has been limited, habeas relief is not available if the jury had before it enough information to assess the witnesses' credibility and motives for testifying. *See Boggs,* 226 F.3d at 739. The trial record in this case demonstrates that counsel for petitioner had ample opportunity to attack the credibility and motivations of Richardson, Heath, and Dumas. With respect to Richardson in particular, "the jury had ample evidence of other prior statements made by Richardson to evaluate his credibility. . . . Specifically, Richardson testified that he had lied or withheld information in this case about the drug transactions, when first interviewed by detectives, because he did not want to be implicated in drug charges." *Latimer,* 2000 WL 33521031, at *2, slip op. at 2-3. In these circumstances, "the jury had sufficient information to make a discriminating appraisal of [Richardson]'s credibility," *Larranaga*, 787 F.2d at 498, and thus petitioner's right of confrontation was not infringed.

For these reasons, the Court should conclude that petitioner has failed to demonstrate that the trial court's restrictions on his cross-examination of Richardson, Heath, and Dumas violated his Sixth Amendment right to confront the witnesses against him. Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this ground.

Van Arsdall do not support petitioner's claims, *Alford* and *Olden* likewise provide petitioner with no basis for habeas relief.

E. *Instructional Error Claim (Claim II)*

Petitioner next contends that the trial court erred by giving special instructions relating to the credibility of accomplices and informants. The Court should conclude that petitioner is not entitled to habeas relief on this basis.

1. *Clearly Established Law*

It is well established that habeas corpus is not available to remedy a state court's error in the application of state law. *See Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991) ("Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Jackson v. Yist,* 921 F.2d 882, 885 (9th Cir. 1990) (a federal court on habeas review "ha[s] no authority to review a state's application of its own laws). Thus, in order for habeas corpus relief to be warranted on the basis of incorrect Jury instructions, a petitioner must show more than that the instructions are undesirable, erroneous or universally condemned; rather, taken as a whole, they must be so infirm that they rendered the entire trial fundamentally unfair. *See Estelle,* 502 U.S. at 72 (1991); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir. 1986); *cf. United States v. Sheffey,* 57 F.3d 1419, 1429-30 (6th Cir. 1995) (standard of review for jury instructions challenged on direct criminal appeal). As the Supreme Court noted in *Estelle,* the Court should "also bear in mind [the Supreme Court's] previous admonition that we 'have defined the category of infractions that violate "fundamental fairness" very narrowly.'" *Estelle,* 502 U.S. at 72-73 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

2. *Analysis*

a. Accomplice Witness Instruction

Petitioner first contends that the trial court should have given an instruction that accomplice testimony should be viewed with extreme caution. Petitioner's theory was that, although Richardson was not an accomplice to the murder itself, he was an accomplice to the drug transactions leading up to the murder, and thus the accomplice witness instruction should have been given.

Petitioner cannot show that he is entitled to relief on this ground. First, the trial court determined, and the court of appeals agreed, that the accomplice witness instruction was not appropriate because Richardson was not an accomplice to the crime with which petitioner was charged. There is nothing unreasonable in this conclusion, or in the state courts' conclusions that an accomplice witness instruction was not required where, as here, the witness was an accomplice to a separate crime not the subject of the petitioner's prosecution. More fundamentally, the federal courts have repeatedly held that a criminal defendant has no constitutional right to an accomplice witness instruction, and thus the failure of a state court to give such an instruction does not provide a basis for granting habeas relief. *See Scott v. Mitchell*, 209 F.3d 854, 883 (6th Cir. 2000); *Kappos v. Hanks*, 54 F.3d 365, 367 (7th Cir. 1995); *Takacs v. Engle*, 768 F.2d 122, 127 (6th Cir. 1985); *Grant v. Rivers*, 920 F. Supp. 769, 783 (E.D. Mich. 1996) (Gadola, J.); *Smithwick v. Walker*, 758 F. Supp. 178, 186 (S.D.N.Y.), *aff'd*, 948 F.2d 1278 (2d Cir. 1991). This is particularly true where, as here, the trial court did give a general instruction that the jury is to determine the credibility of all the witnesses. *See Kappos*, 54 F.3d at 367.

Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

b. Informant Instruction

With respect to the testimony of Heath and Dumas, petitioner contends that the trial court should have given an instruction that informant testimony should also be examined with great caution. As with an accomplice witness instruction, there is no constitutional requirement that a court give an informant instruction, and petitioner is entitled to relief only if he can show that the failure to give the instruction deprived him of a fair trial. *See Smith v. Gibson*, 197 F.3d 454, 460 (10th Cir. 1999); *Fulgham v. Rees*, No. 89-16244, 1990 WL 75510, at *3 (9th Cir. June 7, 1990); *Scott v. Anderson*, 58 F. Supp. 2d 767, 805 (N.D. Ohio 1998), *rev'd on other grounds sub nom. Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000).

Petitioner cannot show that he was denied a fair trial by the court's failure to give a specific informant testimony instruction. As explained above, "[d]efense counsel had ample opportunity to attack [Heath's and Dumas's] credibility and was able to bring to the jury's attention the fact that [they were] not . . . disinterested witnesses." *Gibson*, 197 F.3d at 460. Further, "the trial court instructed the jurors that it remained their responsibility to determine a witness's credibility, after considering, among other things, any bias, prejudice or interest the witness might have in the outcome of the trial." *Id.; see* Trial Tr., Vol. VI, at 107-09. In these circumstances, petitioner cannot show that he was denied a fair trial by the trial court's failure to give a specific informant witness instruction. *See United States v. Jordan*, 223 F.3d 676, 692 (7th Cir. 2000); *Gibson*, 197 F.3d

at 460; *Scott*, 58 F. Supp. 2d at 805. Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

F. *Conclusion*

In view of the foregoing, the Court should conclude that the Michigan Court of Appeals's rejection of petitioner's claims did not result in a decision which was contrary to, or which involved an unreasonable application of, clearly established federal law. Accordingly, the Court should deny petitioner's application for the writ of habeas corpus.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991). *Smith v. Detroit Federation of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

/s/ Paul J. Komives
PAUL J. KOMIVES
UNITED STATES
MAGISTRATE JUDGE

Dated: June 17, 2002